



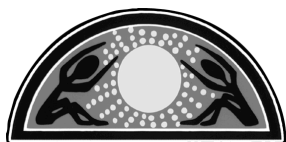
Secretariat of National
Aboriginal and Islander
Child Care

CHILDREN 'GROWING' THE DECLARATION STRONG

Opportunities and strategies for advancing
Indigenous children's rights

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IKANBALA.



SNAICC

Secretariat of National
Aboriginal and Islander
Child Care

**Prepared by Ben Schokman of the Human Rights Law
Centre for and on behalf of SNAICC**

A strong voice for our children and families

SNAICC is the national non-government peak body
that advocates on behalf of Aboriginal and Torres
Strait Islander children and families.

SNAICC

Level 1, 252-260 St Georges Rd
North Fitzroy Victoria 3068

For more information contact SNAICC: Frank Hytten, frank.hytten@snaicc.org.au or Emma
Sydenham, emma.sydenham@snaicc.org.au

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1. Introduction

1.1 Background

The effective implementation of human rights standards is inevitably a gradual, protracted and challenging process. The adoption of the UN Declaration on the Rights of Indigenous Peoples (**Declaration**)¹ by the United Nations General Assembly in 2007 was a landmark moment, reflecting decades of staunch negotiation by Indigenous peoples, and finally proclaiming the unique position of Indigenous peoples and the struggles they face to realise their human rights. The Declaration articulates how human rights set out in other instruments apply to Indigenous peoples in their specific cultural, historical, social and economic circumstances. Since its adoption, however, progress to give full effect to the Declaration has been slow. This is despite the imperatives for states to take urgent and concrete action to redress the stark and persistent human rights violations experienced by many Indigenous peoples around the world.

The *Convention on the Rights of the Child (CRC)*, in operation for over 20 years, has been able to bring about a qualitative transformation of the status of children as the holders of rights.² Its impact has been rapid, widespread and sustained.³ The CRC is the most widely ratified treaty in history and its impact has seen significant change in national laws, policies and programs for the benefit of children.⁴ The CRC was also the first core human rights treaty to include specific references to Indigenous children in a number of its provisions.⁵ As the Committee on the Rights of the Child recognises, the specific references to Indigenous children in the Convention are indicative of the recognition that they require special measures in order to fully enjoy their rights.⁶

Yet, Indigenous children around the world still continue to face significant challenges in exercising their rights. The Declaration is a pivotal instrument for government and non-governmental actors alike to change this reality. In addition, using the strengths of both the Declaration and the CRC in tandem offers significant opportunity to overcome persistent challenges and strengthen the protection and fulfilment of the rights of all Indigenous children.

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007).

² See generally Philip Alston and John Tobin, *Laying The Foundations for Children's Rights: An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* (2005), available at http://www.unicef-irc.org/publications/pdf/ii_layingthefoundations.pdf.

³ See generally United Nations Children's Fund (UNICEF), *Study on the Impact of the Implementation of the Convention on the Rights of the Child: Summary Report* (2004), available at http://www.unicef-irc.org/publications/pdf/CRC_Impact_summaryreport.pdf.

⁴ Institut international des droits de l'enfant (IDE) and Office of the High Commissioner for Human Rights (OHCHR), *18 Candles: The Convention on the Rights of the Child Reaches Majority* (2007), available at <http://www.ohchr.org/Documents/Publications/crc18.pdf>.

⁵ See articles, 17, 29 and 30 of the Declaration.

⁶ Committee on the Rights of the Child, *General Comment No. 11: Indigenous Children and their rights under the Convention*, UN Doc CRC/C/GC/11 (2009), [5].

1.2 Purpose of this Paper

This paper explores various avenues to give greater attention to the protection and promotion of Indigenous children's rights through implementation of the CRC in combination with the Declaration.

In this context, the purpose of this working paper is threefold:

- (a) to identify opportunities to use the CRC to strengthen and enhance the implementation of the standards and principles contained in the Declaration;
- (b) to increase awareness of the international UN human rights system to advance advocacy in relation to Indigenous children's rights; and
- (c) to identify strategic campaigns to be used by Indigenous organisations to advance the rights of Indigenous children at the national and international level.

This paper begins by **discussing the international mechanisms for advancing Indigenous children's rights and the guiding principles of the Declaration**. It then identifies the **key successes and strengths of the CRC in its first 20 years** and outlines the **strong complementarities between the CRC and the Declaration**, with a view to determining emerging opportunities for advancing the rights of Indigenous children. The paper concludes by identifying practical opportunities and making **recommendations about new opportunities to advance the rights of Indigenous children** at both the international and domestic levels.

In summary, the successes and strengths of the CRC present important and tangible lessons and opportunities to advance the protection and promotion of the rights of Indigenous children, which can be informed by the Declaration in a reinforcing and mutually beneficial way. In seeking to advance the implementation of the Declaration for the benefit of Indigenous children, the immediate challenge is to ensure that the legal and institutional foundations are in place to build a strong system to make children's rights a reality.⁷

2. Advancing the Rights of Indigenous Children

Indigenous children around the world continue to be subjected to serious, ongoing and systemic violations of their rights in many facets of life. As recognised by UNICEF:⁸

Indigenous children consistently number among the most marginalized groups in society and are frequently denied the enjoyment of their rights, including the highest attainable standard of health, education, protection and participation in decision-making processes that are relevant to their lives.

While there has been growing awareness of the human rights of Indigenous peoples in recent years, human rights issues impacting Indigenous children have remained largely invisible.

⁷ Alston and Tobin, above n 2, v and ix.

⁸ United Nations Children's Fund (UNICEF), *Ensuring the Rights of Indigenous Children*, Innocenti Digest No.11, UNICEF Innocenti Research Centre, October 2003, p.2.

The rights of Indigenous children are often obscured by other issues of broader concern to Indigenous peoples, such as land rights and political representation.⁹

Not only are Indigenous children invisible in the Indigenous rights space, states also give insufficient attention to the promotion of Indigenous children's rights and development in consideration of children's rights.¹⁰ Similarly, children are too often skipped over in strategies to overcome poverty. Indigenous children thereby experience discrimination on multiple levels – as children, as members of Indigenous communities and as impoverished people – deepening their invisibility and compounding the violations of their human rights across the spectrum.

2.1 International Mechanisms for Indigenous Children's Rights

At the international level, there are three key UN bodies that are mandated to deal specifically with Indigenous peoples:

- (a) the UN Permanent Forum on Indigenous Issues;
- (b) the UN Expert Mechanism on the Rights of Indigenous Peoples; and
- (c) the Special Rapporteur on the Rights of Indigenous Peoples

These mechanisms provide guidance to states on the implementation of their human rights obligations as they relate to Indigenous peoples. There are also treaty bodies, such as the Committee on the Rights of the Child, which are committees of experts that monitor the implementation of human rights treaties that are ratified by states. Each of these mechanisms and their role in promoting the rights of Indigenous children is explored briefly below.

(a) *UN Permanent Forum on Indigenous Issues*

The United Nations Permanent Forum on Indigenous Issues is an advisory body to the Economic and Social Council (**ECOSOC**). Its mandate is to discuss Indigenous issues related to economic and social development, culture, the environment, education, health and human rights.

The Permanent Forum's membership comprises sixteen independent experts – eight members nominated by states and eight members nominated directly by Indigenous organisations. The Permanent Forum first met in 2002 and meets annually for two weeks in New York.

The Permanent Forum's role is largely to provide expert advice and recommendations on Indigenous issues to ECOSOC and to promote the coordination of activities related to Indigenous peoples within the UN system.¹¹ The Permanent Forum agreed in its first session to incorporate children and youth as an ongoing focal point and held its second session on the theme of "Indigenous children and

⁹ Ibid.

¹⁰ Ibidp.5.

¹¹ Further information about the Permanent Forum is available at <http://social.un.org/index/IndigenousPeoples.aspx>.

youth”.¹² However, its focus has been somewhat inadequate, with no specific recommendations on children despite a focus on Indigenous development with culture and Identity.

(b) *Expert Mechanism on the Rights of Indigenous Peoples*

The Expert Mechanism on the Rights of Indigenous Peoples is an advisory body to the Human Rights Council, which is the UN’s major multilateral body with responsibility for human rights. It provides the Human Rights Council with thematic advice on the rights of Indigenous peoples, in the form of studies and research.

The Expert Mechanism first met in 2008 and meets annually in Geneva. It comprises five experts on Indigenous rights who are appointed by the Human Rights Council.

The Expert Mechanism’s studies are authoritative interpretations of Indigenous peoples’ rights and are important resources for Indigenous peoples, states, national human rights institutions, international organisations and other stakeholders on how to best protect, respect and promote the rights of Indigenous peoples.

To date, the Expert Mechanism has completed two studies. Most relevant to Indigenous children, a study on Indigenous peoples’ right to education was completed in 2009. In 2011, its second study was undertaken on the right to participate in decision making.¹³

(c) *UN Special Rapporteur on the Rights of Indigenous Peoples*

Special procedures are independent experts appointed by the Human Rights Council with a mandate to investigate and monitor particular human rights issues. There are currently 31 thematic mandates and eight country mandates who address specific thematic issues or country situations around the world. One of the specific thematic mandates is the Special Rapporteur on the Rights of Indigenous Peoples.

By virtue of their independence and the nature of their mandates, the special procedures have been described by the UN High Commissioner for Human Rights as “the eyes and ears of the international human rights machinery”.¹⁴ They play a crucial role in monitoring states’ compliance with their international obligations. The special procedures have a range of functions, including undertaking country visits to review human rights situations, receiving individual complaints about alleged human rights violations, contributing to thematic studies on topics of special importance, and promoting good practices by states.¹⁵

¹² Further information about the work of the Permanent Forum on the theme of Indigenous children and youth is available at <http://social.un.org/index/IndigenousPeoples/CrossThematicIssues/ChildrenandYouth.aspx>.

¹³ Further information about the Expert Mechanism, including links to advices and studies, is available at <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx>.

¹⁴ See statement of the UN High Commissioner for Human Rights, “Human rights experts have a key role in early warning” (23 November 2009), available at <http://www.ohchr.org/EN/NewsEvents/Pages/KeyRoleEarlyWarning.aspx>.

¹⁵ Further information about the Special Rapporteur on the Rights of Indigenous Peoples is available at <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx>.

The mandate of the Special Rapporteur on the Rights of Indigenous Peoples was established in 2001. The UN Human Rights Council has requested the Special Rapporteur to pay particular attention to the situation of Indigenous children. While several recommendations included in his annual and mission reports have focused on their specific situation, there has not yet been any consolidated study on any major human rights concerns of Indigenous children or youth.

(d) UN Human Rights Treaties

In addition to the *Convention on the Rights of the Child* (discussed further below), there are various human rights treaties which relate to the rights of Indigenous children, whether directly or indirectly. These include the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries*.

For states who ratify them, human rights treaties create legally binding obligations on governments to give effect to the rights and standards contained in those treaties. There are ten human rights treaty bodies that monitor the implementation of the core international human rights treaties. The treaty bodies consist of independent experts who provide guidance to states to comply with their treaty obligations.

Most relevant to Indigenous children, in 2003 the Committee on the Rights of the Child held an annual day of general discussion on the rights of Indigenous children and adopted specific recommendations.¹⁶ In 2009, the Committee adopted its General Comment No. 11 on Indigenous Children,¹⁷ which is discussed further below.

(e) UNICEF

UNICEF is the United Nations Children's Fund and is the world's leading advocate for children. It was established in 1946 as an agency of the UN to help governments improve the health and education of children. UNICEF is on the ground in over 150 countries around the world and works in emergency relief and on longer term development projects for children.¹⁸

2.2 The Declaration on the Rights of Indigenous Peoples

The Declaration establishes a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's Indigenous peoples. Its adoption by the UN General Assembly in 2007 followed more than two decades of discussions and negotiations within the United Nations system and between governments and Indigenous peoples' representatives.

¹⁶ Available at <http://www2.ohchr.org/english/bodies/crc/docs/discussion/indigenouchildren.pdf>.

¹⁷ Committee on the Rights of the Child, *General Comment No. 11: Indigenous Children and their rights under the Convention*, UN Doc CRC/C/GC/11 (2009).

¹⁸ Further information about UNICEF is available at <http://www.unicef.org/>.

The negotiation and adoption of the Declaration was a remarkable success of the Indigenous peoples' movement. Indigenous peoples were closely involved in the drafting process, as reflected in the nature and wording of the Declaration itself, which has armed Indigenous communities and organisations around the world with a doctrine to protect their human rights.

The Declaration marks a significant shift in the way that Indigenous peoples define themselves and their rights, and how others see and define the rights of Indigenous peoples. It empowers Indigenous peoples and may play a transformative role in building the capacity of Indigenous peoples and governments to advance the rights contained in the Declaration.

The Declaration is said not to create any new rights. Rather, it elaborates upon existing international human rights norms and principles as they apply to Indigenous peoples. As a resolution of the General Assembly, the Declaration may not at this stage, on its own, have legally binding effect. Nevertheless, the Declaration provides influential guidance on the content of human rights as they particularly relate to Indigenous peoples. In this respect, the Declaration has at the least "significant moral force"¹⁹ and establishes a framework for the human rights that already exist in international law and their specific application to Indigenous peoples.

A number of key "guiding principles" of the Declaration have been identified which underpin the rights contained within it:²⁰

- (a) self-determination;
- (b) participation in decision-making and free, prior and informed consent;
- (c) respect for and protection of culture; and
- (d) non-discrimination and equality.

Each of these guiding principles is explored further below.

(a) Self-determination

The right of self-determination has a particular significance for Indigenous peoples and is enshrined in various articles of the Declaration, including articles 3, 4, 18, 19, 23 and 32. It is one of the key principles in the Declaration, for which Indigenous peoples consistently fought.

The Special Rapporteur on the Rights of Indigenous Peoples has commented that the inclusion of the right of self-determination in the Declaration "responds to the aspirations of Indigenous peoples worldwide to be in control of their own destinies under conditions of equality, and to participate effectively in decision-making that affects them."²¹ The Special Rapporteur also states that the right of self-determination

¹⁹ M Davis, *The United Nations Declaration on the Rights of Indigenous Peoples* (2007) 11(3) AILR 55, 55.

²⁰ These principles have been identified by the Australia's Aboriginal and Torres Strait Islander Social Justice Commissioner in his Social Justice Report 2011, available at http://www.hreoc.gov.au/social_justice/sj_report/sjreport11/index.html.

²¹ James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009) [41].

“is a foundational right, without which Indigenous peoples’ human rights, both collective and individual, cannot be fully enjoyed.”²²

The right to self-determination may be expressed in various ways, including through full and effective participation of Indigenous peoples at every stage of any action that may affect them directly or indirectly. The essence of the right is the notion that a group of people must have control over their own lives.

(b) *Participation in Decision-Making*

Closely related to the right of self-determination is the duty to consult with Indigenous peoples on decisions affecting them, which is a fundamental obligation upon states that is firmly entrenched in international human rights law. The importance of the right to participate in decision-making is reflected through its consistent reference in numerous articles of the Declaration.²³ In particular, article 18 provides that Indigenous peoples have the right to participate in decision-making in matters that would affect their rights, through their chosen representatives.

Effective participation is a fundamental element to empowering vulnerable and disadvantaged communities and critical to establishing a relationship of mutual respect with governments and their agencies.

(c) *Respect for Culture*

Respect for and protection of culture and identity are recognised as a core component of the right to self-determination and a central principle of the Declaration. Respect for culture operates as a lens through which other rights contained in the Declaration are interpreted. Articles 11-13 of the Declaration specifically articulate how the right to culture applies to Indigenous peoples.

Recognition of the distinctive histories, languages, identities, cultures and traditional lands of Indigenous peoples are necessary to ensure the continuing existence, development and wellbeing of Indigenous peoples. Article 8 of the Declaration recognises, among other things, that Governments shall prevent actions that take away the distinct cultures and identities of Indigenous peoples. This is supported by the provision in specific articles for distinct institutions to ensure the realisation of other rights, such as the right to education (article 14) and the right to health (article 24).

(d) *Non-Discrimination*

The right to equality and non-discrimination is a fundamental tenet of human rights law and is a norm of customary international law. The particular meaning and content of the right to equality and non-discrimination as it relates to Indigenous peoples is enshrined in article 15(2) of the Declaration:

States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate

²² Ibid.

²³ See articles 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 38, 40 and 41.

discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

The particular significance of the need to eliminate racial discrimination is reflected in the development and adoption of CERD, an entire treaty dedicated to the prevention of racial discrimination. The Committee on the Elimination of Racial Discrimination has highlighted the particular significance of the right of non-discrimination to Indigenous peoples in issuing its General Recommendation No. 23 that relates specifically to Indigenous peoples.²⁴

Often, providing the same opportunities that are provided to others may not be enough to ensure that Indigenous peoples are able to enjoy their fundamental rights on an equal basis with others. Ensuring that Indigenous peoples have equal opportunities may require that states take positive or “special measures” to compensate for historic injustices and disadvantages. The purpose of special measures is to ensure substantive equality for Indigenous peoples. Such measures must reflect the aspirations of the peoples concerned and involve their free, prior and informed consent. As such, effective participation of affected communities is essential to protect, maintain and develop their cultures and identities, customs, traditions and institutions.

CERD’s General Recommendation No. 23 also highlights the importance of recognising and respecting Indigenous culture, history, language and way of life, and ensuring equal rights in respect of effective participation in decision-making.²⁵

3. Convention on the Rights of the Child: Key Successes and Strengths

The CRC was adopted by the UN General Assembly on 20 November 1989 and entered into force on 2 September 1990. As a legally binding document, the CRC has been instrumental in setting standards of children’s rights and motivating institutional capacity-building for the promotion and protection of children.²⁶ Since its inception, many countries have undertaken legislative reforms to include children’s rights in their constitutions.²⁷

Some of the key successes and strengths of the CRC in its first 20 years of operation include:

- (a) ***Universal acceptance of the CRC by states:*** Although in existence for only two decades, the CRC is the only international human rights treaty that enjoys almost

²⁴ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* (1997), UN Doc A/52/18, annex V.

²⁵ *Ibid.*, [4].

²⁶ Yanghee Lee, “Participation and compliance: The Committee on the Rights of the Child” in United Nations Children’s Fund (UNICEF), *The State of The World’s Children, Special Edition: Celebrating 20 Years of the Convention on the Rights of the Child* (2009), p.50, available at <http://www.unicef.org/rightsite/sowc/fullreport.php>.

²⁷ *Ibid.*

universal ratification. With 193 ratifications to date, the standards that the Convention enshrines have been universally accepted by states.²⁸

- (b) **Legally binding nature of the CRC:** Given its status as a treaty, the CRC imposes legally binding obligations on states who ratify it. This requires states to take all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the CRC.
- (c) **Universal coverage under the CRC:** The CRC enshrines the full range of economic, social, cultural, civil and political rights as they apply to children. Indeed, the CRC was one of the first human rights treaties to combine economic, social and cultural rights with civil and political rights in a single instrument. This is particularly important given the indivisible, interdependent nature of rights and the fact that the enjoyment of many rights is dependent or contingent on, and contributes to, the enjoyment of other human rights.²⁹

Human rights do not exist in isolation. Rather, the enjoyment of many rights is dependent or contingent on, and contributes to, the enjoyment of other human rights. The enjoyment of economic, social and cultural rights is crucial to the enjoyment of civil and political rights. Social inclusion is essential to political participation, and therefore to the maintenance of a truly democratic system. For example:

- meaningful exercise of the right to participate in political life and public affairs requires access to information and realisation of the right to education;
- the right to privacy is largely illusory for homeless people who are forced to live their private lives in public space contrary to the right to adequate housing; and
- access to adequate health care, consistent with the right to the highest attainable standard of health, is necessary if a person is to remain able to exercise their rights to freedom of movement and association.

- (d) **Impact of the CRC at the Domestic Level:** The CRC has been directly incorporated into domestic law in a large number of states across the world and courts have adopted important decisions applying the treaty's provisions.³⁰ As a result, the CRC has had a "deep and profound influence" on national legislation, policy and programs, as well as institutions, communities and individuals.³¹

²⁸ The CRC has been ratified by 193 countries, with only two outstanding: Somalia and the United States, both of which have indicated their support by signing the treaty.

²⁹ See generally OHCHR, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002), p.2–3; United Nations, *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN A/CONF.157/23 (1993).

³⁰ UNICEF, *State of the World's Children Report*, above n 26, pp.9-11.

³¹ *Ibid* p.1.

Over the past two decades, around 70 states have enacted consolidated children's statutes as part of law reform efforts to support child rights.³² Many countries have also integrated the CRC into their national constitutions.

At least 12 states have implemented domestic laws in response to an express recommendation by the Committee on the Rights of the Child.³³

In Latin America in particular, frameworks have been introduced that recognise the civil, political economic, social and cultural rights of children.³⁴

- (e) ***The CRC has transformed the way children are viewed:*** Beyond its legislative impact, the CRC has helped to transform attitudes of children away from being the property of parents or guardians or objects of generosity or goodwill and towards children as being rights-holders and social actors.³⁵ This is particularly evident in the increased usage of 'child rights' language in the vernacular of national and international legal documents, policies, programs and advocacy.³⁶

4. The Declaration and the CRC: Complementarities and Opportunities

This section identifies the strong complementarities between the Declaration and the CRC and opportunities that exist to advance the rights of Indigenous children. Both instruments provide complementary and reinforcing tools to advocate for the implementation of the rights contained in the Declaration for the benefit of Indigenous children.

4.1 Complementary and Reinforcing Principles

As outlined in section 2 above, there are a number of key guiding principles of the Declaration. The Committee on the Rights of the Child has also identified that the CRC is underpinned by four guiding principles, namely:

- (a) the best interests of the child;
- (b) non-discrimination;
- (c) the right to life, survival and development; and
- (d) respect for the views of the child.

The guiding principles are the backbone to the CRC and instrumental to achieving all of the other rights.

³² Ibid p.26.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid p.2. See also IDE and OHCHR, above n 4.

³⁶ UNICEF, State of the World's Children Report, above n 26, p.9.

The table below outlines some of the key complementarities of the guiding principles of the Declaration and the CRC.

Table: Complementarities between the Declaration and the CRC

Declaration on the Rights of Indigenous Peoples	Convention on the Rights of the Child
Right of non-discrimination (Articles 2, 15)	Ensure the rights of each child without discrimination, including special measures (Article 2)
Right of self-determination and participation in decision-making (Articles 3, 4, 18, 19, 23 and 32)	Right to be heard, including participation in consultation processes and respect for the views of the child (Article 12)
Respect for culture (Articles 8, 11-13)	Best interests of the child shall be a primary consideration (Article 3) Right to life, survival and development (Article 6) Right to culture in community with other members of his or her group (Article 30)
Right to full enjoyment of all human rights (Article 1)	General measures of implementation and right to an effective remedy (Article 2)

(a) Equality and Non-Discrimination

Article 2 of the CRC obliges states to ensure the right of each child within its jurisdiction without discrimination of any kind. The Committee on the Rights of the Child has identified that non-discrimination is a principle of fundamental importance for the implementation of all of the rights enshrined in the CRC and that the principle must be reflected in all domestic legislation.

The CRC requires states to consider the application of special measures in certain circumstances to ensure that Indigenous children have access to culturally appropriate services in the areas of health, nutrition, education, social services, housing and juvenile justice, among others.³⁷ The Committee's General Comment No. 11 identifies the positive obligation on states to ensure that Indigenous children are able to enjoy the rights contained in the CRC on an equal basis.³⁸

The theme of equality and non-discrimination – and the need for governments to take positive measures – also runs strongly throughout the Declaration. Rights such as language (Article 13 of the Declaration), education (Article 14) and consent (Article 19), to name only a few, all require positive steps by governments to ensure the equal

³⁷ See General Comment No. 11, [25].

³⁸ See General Comment No. 11, [23]-[26].

realisation of rights for Indigenous peoples. Special measures are also specifically provided for in Article 21 of the Declaration.

The legal obligation to ensure the rights of each child without discrimination contained in Article 2 of the CRC therefore provides an important opportunity to enhance equality rights for Indigenous children, as well as to advance implementation of equality and non-discrimination as a guiding principle of the Declaration.

(b) *Self-Determination, Participation and the Right to be Heard*

One of the key concepts and guiding principles of both the CRC and the Declaration is the importance of participation in decision-making and the need for specialised independent institutions to ensure such participation. Article 12 of the CRC places an obligation on government to ensure that children's views are sought and considered in the development of laws, policies and programs that affect them.

UNICEF has identified that Article 12 of the CRC has had the effect of prompting greater inclusion of children's voices in development efforts that affect them.³⁹ There has been a growing acceptance that special attention must be paid to the promotion and safeguarding of children's rights, including through the design of special independent institutions or focal points within national human rights institutions.⁴⁰

Similarly, representative bodies are regarded as being a fundamental component of efforts to make lasting progress in improving the conditions of Indigenous peoples. Effective engagement with and participation of Indigenous peoples is central to the right of self-determination and to achieving the realisation of other fundamental human rights for Indigenous peoples. The establishment of independent institutions provides for enhanced participation of Indigenous children in decision-making processes at all levels.

In a growing number of countries, monitoring of government with respect to child rights is performed by a specialised institution, such as Norway's Ombudsman and New Zealand's Commissioner for Child Rights. Some countries also have parliamentary oversight committees that examine progress on child rights.⁴¹

(c) *Respect for Culture and Best Interests of the Child*

Article 3 of the CRC provides that when actions concerning children are undertaken the best interest of the child must be taken into account as a primary consideration. The 'best interests of the child' is a leading principle for the implementation of all the substantive articles contained in the CRC and requires governments (and other stakeholders) to review their actions for the impact on children.

³⁹ See generally UNICEF, State of the World's Children Report, above n 26, p.9.

⁴⁰ UNICEF, above n 3.

⁴¹ UNICEF, State of the World's Children Report, above n 26, p.8.

The Committee on the Rights of the Child has identified that the principle of the best interests of the child requires particular attention in the context of Indigenous children.⁴² Any efforts to promote the rights of Indigenous children must be informed by an understanding of and respect for culture, particularly given that the survival and development of Indigenous children is intimately linked to their culture, beliefs and spirituality, as well as to access their land and its resources.⁴³

The Committee has also observed that consideration of the 'best interests' principle requires specific attention to be afforded to how the right relates to collective rights, cultural rights, and the need for the participation of the Indigenous community, including children, in the development of legislation, policies and programs.⁴⁴

As UNICEF has identified, the 'best interests' principle has proved to be a vital influence on legislation, strategies, policies and programs in support of children's rights.⁴⁵ The 'best interests' principle may therefore be useful to advocate for states to undertake active measures to implement the guiding principles and rights contained in the Declaration throughout their legislative, administrative and judicial systems.

4.2 Protection of Substantive Rights

In addition to the guiding principles outlined above, the CRC contains specific articles that protect the civil, political, economic, social and cultural rights of all children, including Indigenous children. The rights include:

- (a) civil rights and freedoms (articles 7, 8, 13-17 and 37 of the CRC);
- (b) family environment and alternative care (articles 5, 9-11, 18-21, 25, 27 and 39);
- (c) basic health and welfare (articles 6, 18, 23, 24, 26, 27);
- (d) education (articles 28, 29 and 31); and
- (e) special protection measures, such as juvenile justice (see, e.g., articles 37 and 40).

Similarly, the Declaration enshrines the rights of Indigenous peoples across the entire spectrum of human rights, and also contains provisions for special protection measures where required.

UNICEF has identified that the catalytic role of the CRC is most evident in law reform.⁴⁶ An increasing number of states now make specific reference to the human rights of children in national constitutions and in other legislation. The incorporation of the CRC into national laws across the world provides a useful tool to use such laws to implement the rights contained in the Declaration as they relate to Indigenous children. Given that the Declaration does not, on its own, at this stage establish any legally binding obligations, the legal status of the CRC

⁴² General Comment No. 11, [30].

⁴³ UNICEF Digest No.11, above n 8, p.3.

⁴⁴ General Comment No. 11, [30]-[31].

⁴⁵ UNICEF, State of the World's Children Report, above n 26, p.8.

⁴⁶ UNICEF, above n 3.

therefore has great capacity to contribute to significant change in national laws, policies and programs for the benefit of Indigenous children.

4.3 Normative Development of Indigenous Children's Rights

An additional benefit relating to the legal nature of the CRC is the opportunity to develop jurisprudence on its relevant provisions as they relate to Indigenous children. In a number of countries, the incorporation of the CRC into the national legal system has led to the adoption of important legal decisions concerning the rights of children.⁴⁷

In addition to the development of jurisprudence at the domestic level, the work of the Committee on the Rights of the Child also provides a number of important tools to promote and protect the rights of children which aren't available through the Declaration. These tools include:

- (a) **Periodic Reporting Process:** The requirement for states to report regularly to the Committee on the Rights of the Child presents an important opportunity to review the implementation of the CRC with respect to Indigenous children through the lens of the Declaration. The reporting process also provides a valuable space for Indigenous children to articulate their claims.⁴⁸
- (b) **General Comments:** The formulation by the Committee of thematic General Comments provides important guidance to states on how to interpret and apply the rights contained in the CRC. This presents an opportunity to influence the normative development of rights, standards and obligations as they relate to Indigenous children in a way that is compatible with the Declaration.

The Committee on the Rights of the Child therefore presents important opportunities to contribute to the development of authoritative jurisprudence on children's rights that is consistent with and provides guidance on the implementation of the Declaration. This opportunity is discussed in further detail in the following section regarding opportunities provided by the Third Optional Protocol to the CRC.

Recommendation: Relationship between the Declaration and the CRC

In implementing their legal obligations under the CRC, all states parties should recognise the guidance and assistance provided by the UN Declaration on the Rights of Indigenous Peoples in promoting and protecting the rights of Indigenous children.

⁴⁷ UNICEF, above n 3. The Constitutional Courts of Belarus and of the Czech Republic, for example, have found parts of the family codes of those countries invalid, because they were incompatible with rights or principles recognized by the CRC.

⁴⁸ IDE and OHCHR, above n 4.

5. Emerging Opportunities to Advance Indigenous Children's Rights

This section outlines emerging opportunities for advancing the rights of Indigenous children at the national and international level.

Table: Opportunities to Advance Indigenous Children's Rights

Guiding Principle	Emerging Opportunities
Right to an effective remedy	Third Optional Protocol to the CRC
Respect for culture	CRC General Comment No. 11
Right to self-determination and the right to be heard	Establishment and strengthening of national institutions, such as Children's Commissioners
Normative development of the rights contained in the Declaration	Raising the profile of Indigenous children in international forums Periodic Reporting to the UN Committee on the Rights of the Child

5.1 A New International Complaints Mechanism – Third Optional Protocol to the CRC

(a) *About the Third Optional Protocol*

The text of the Third Optional Protocol was adopted by the UN General Assembly in December 2011. Its purpose is to provide international communication mechanisms to “complement such national mechanisms and further enhance the implementation of the Convention”.

The Third Optional Protocol establishes three procedures:

- (a) an individual communications procedure, which provides a channel for individuals or groups of individuals to submit a complaint to the Committee of an alleged violation of any of the rights contained in the CRC (or its First or Second Optional Protocols) and to seek redress for that violation;⁴⁹
- (b) an inter-state complaints procedure, which allows the Committee to consider communications by one State party alleging that another State party is not fulfilling its obligations under the CRC or its Optional Protocols. Prior to being subject to the Committee's jurisdiction as regards inter-state complaints, a State party must take the additional step to acknowledge and declare its acceptance of the Committee's jurisdiction;⁵⁰ and

⁴⁹ Article 5 of the Third Optional Protocol.

⁵⁰ Article 12 of the Third Optional Protocol.

- (c) an inquiry Procedure, which allows the Committee to initiate investigations into allegations of grave or systemic violations of CRC or its Optional Protocol rights by a State party upon receipt of reliable information.⁵¹

The Third Optional Protocol does not create any new rights but rather provides a redress mechanism for violations of rights under the CRC and its First and Second Optional Protocols.

(b) *Opportunities to Develop Jurisprudence on the Declaration*

The Third Optional Protocol will enable the Committee on the Rights of the Child to develop a focused and detailed jurisprudence to assist states parties in the implementation of their obligations under CRC. Currently, complaints to other human rights bodies relating to issues affecting children are not dealt with or considered by a committee with specialist expertise on children's rights. Under the Third Optional Protocol, hearing of complaints by a specialist body will provide practical and authoritative interpretation of the CRC's provisions and states' obligations through the development of international children's rights jurisprudence.

In its operation to date, the CRC has led to in a notable influence on jurisprudence at the national, regional and international levels.⁵² The CRC can therefore be used to develop specific jurisprudence on the meaning and content of relevant rights contained in the Declaration relating to Indigenous children, and indeed more broadly. Particularly given the commonalities in the 'guiding principles' of both instruments, the Third Optional Protocol therefore represents a significant opportunity to advance the implementation of the Declaration by states that may not necessarily be possible through the use of only the Declaration itself.

(c) *Opportunities for NGOs*

NGOs could look to use the development of the Third Optional Protocol in the following ways:

- Campaigns at the domestic level to influence states to ratify the Third Optional Protocol should be a priority for NGOs.
- Once ratified, NGOs could use complaints to the Committee on the Rights of the Child on behalf of Indigenous children to provide information to the Committee on the content and meaning of the Declaration as it relates to the rights of Indigenous children. This will provide great assistance to the Committee, as well as seek to influence the normative development of children's rights standards that is compatible with the Declaration.
- NGOs could advocate at the domestic level to ensure that views and recommendations of the Committee are respected by governments and incorporated into government processes in order to give full effect to the Declaration.

⁵¹ Article 13 of the Third Optional Protocol.

⁵² IDE and OHCHR, above n 4.

Recommendation: Third Optional Protocol

All states must expeditiously ratify the Third Optional Protocol to the Convention on the Rights of the Child to provide a complaints mechanism for violations of the rights of children, including Indigenous children. Ratification of the Third Optional Protocol would complement existing and strengthen existing domestic mechanisms for protecting children's rights.

5.2 CRC General Comment No 11

(a) *About the General Comment*

In 2009, the Committee on the Rights of the Child adopted its General Comment No. 11 on Indigenous children and their rights under the CRC. General Comments are authoritative statements issued by the Committee which provide guidance and direction to states on how to implement their obligations under the CRC.

Especially given the legal nature of the CRC, use of General Comment No. 11 provides Indigenous organisations with an opportunity to advance the implementation of the Declaration through the legally binding obligations of the CRC.

In terms of its content, General Comment No. 11:

- (a) explores the challenges which prevent Indigenous children from enjoying their rights under the CRC;
- (b) highlights special measures required to be undertaken by states regarding Indigenous children's rights; and
- (c) provides examples of good practices in the practical implementation of rights for Indigenous children.

Particular emphasis is placed in the General Comment on the inter-relationship between the CRC's guiding principles.

(b) *Opportunities for NGOs*

The content of General Comment No. 11 provides a valuable 'action plan' for NGOs to strengthen their advocacy to advance the rights of Indigenous children. This may include:

- (a) advocating with governments to assist them to understand General Comment No. 11 and the CRC's provisions and how they apply specifically to Indigenous children;
- (b) encourage and assist stakeholders to use General Comment No. 11 to advocate for changes in national legislation, policies and practices;
- (c) use General Comment No. 11 in submissions to provide guidance to domestic courts to ensure that judicial decisions give proper consideration to relevant human rights and the way they are applied to Indigenous children;

- (d) refer to the General Comment No. 11 in other international human rights forums to ensure the development of cross-jurisdictional principles and standards.

Recommendation: CRC General Comment No 11

All states should prioritise incorporating the principles and guidance provided by General Comment No 11 of the Committee on the Rights of the Child (2009) relating to Indigenous children and their rights under the CRC. In particular, states should ensure that all legislative, administrative, financial and other processes recognise the special measures required, including positive measures of protection, to be taken in order to ensure that Indigenous children enjoy the rights contained in the CRC on an equal basis with all children.

5.3 National Institutions

(a) The Importance of National Institutions

As identified by UNICEF, independent national children's rights institutions – such as children's ombudsman offices and commissioners for children – have been established by law in many countries. Since the early 1990s, more than 60 institutions have been created, which at least partly reflects the commitment by states to achieving effective implementation of the CRC.⁵³

The development of these national institutions provides a valuable opportunity to ensure that such institutions are vested with appropriate mandates, functions and powers with respect to Indigenous children. The advantages of ensuring that these bodies or mechanisms have appropriate regard to Indigenous children include that it would assist to:

- (a) make Indigenous children more visible in government's actions;
- (b) ensure coordination across various arms and levels of government;
- (c) provide guidance and assistance to government on actions relating to Indigenous children and assist in developing a culturally appropriate agenda and strategies; and
- (d) monitor progress of implementation of the CRC and Indigenous children's rights.

Indeed, since the establishment of the CRC some institutions have made serious and innovative attempts to involve children directly in their activities, including establishing advisory boards of children, having contact with children through interactive websites and consultative arrangements with groups of school students.⁵⁴

⁵³ UNICEF, above n 3.

⁵⁴ UNICEF, above n 3.

(b) Opportunities for NGOs

Where independent national children's rights institutions currently do not exist, NGOs should focus their domestic advocacy on encouraging and assisting governments to establish such institutions as part of their obligations under the CRC.

Where institutions already exist, or where institutions are being developed, NGOs could focus on ensuring that institutions are vested with specific powers, mandates and functions with respect to Indigenous children. These functions could focus on ensuring that the guiding principles of both the CRC and the Declaration are central to the role of the children's rights institution.

Recommendation: National Institutions

All states should prioritise the establishment of national institutions, such as children's commissioners, to ensure that special attention is paid to the promotion and safeguarding of children's rights, including in particular Indigenous children. Such institutions should have specific powers, mandates and functions with respect to Indigenous children to ensure that the CRC's guiding principles, namely the best interests of the child, the right to be heard, the right to life survival and development and non-discrimination, are respected and promoted.

5.4 Raising the Profile of Indigenous Children in International Forums

(a) International Mechanisms for Indigenous Children's Rights

As identified in section 2 above, there are several international bodies and mechanisms which have mandates to provide guidance on the implementation of human rights obligations as they relate to Indigenous peoples, as well as bodies relating to children's rights. One key gap, however, is the lack of institutions that have specific regard to or responsibility for monitoring the human rights of Indigenous children.

(b) Opportunities for NGOs

There are several international bodies and mechanisms that Indigenous organisations could target to ensure that Indigenous children are included as standing items in formal agendas and workings. These include:

- (a) the Permanent Forum on Indigenous Issues;
- (b) the Expert Mechanism on the Rights of Indigenous Peoples;
- (c) the Special Rapporteur on the Rights of Indigenous Peoples; and
- (d) the Committee on the Rights of Child.

Indigenous organisations could ensure that information specifically relating to the rights of Indigenous children are submitted to these forums, as well as lobby the bodies to ensure that Indigenous rights are included as standing agenda items or as subjects of thematic reports.

In addition, Indigenous organisations could also target key mechanisms and organisations to develop appropriate resources and materials relating specifically to the rights of Indigenous children. For example, a request could be made to UNICEF to focus its next state of the World's Children Report on Indigenous children, or the Permanent Forum could be requested to develop a specific Indigenous Child Rights Guide.

The right to be heard has spurred greater inclusion of children's voices in development efforts that affect them, from local projects such as peer education and the construction of child-friendly schools to international children's congresses, interventions before parliaments or the UN General Assembly, and dialogue with world leaders at the G8 Summits.⁵⁵ Children's participation has also influenced such key processes as the recommendations of the UN Secretary-General's Study on Violence against Children.⁵⁶

Recommendation: International Human Rights Mechanisms

The Permanent Forum encourages other UN mechanisms responsible for the protection of Indigenous rights and for the protection of children's rights to include the discussion of Indigenous children's rights as standing agenda items. These mechanisms include treaty bodies (in particular, the CRC and CERD), the Expert Mechanism on the Rights of Indigenous Peoples, the Special Rapporteur on the Rights of Indigenous peoples.

5.5 Periodic Reporting to the UN Committee on the Rights of the Child

One specific opportunity to contribute to the normative development of obligations and standards regarding the human rights of Indigenous children is the periodic reporting process for states that are parties to the CRC. In addition to the information submitted by states when being reviewed, the Committee on the Rights of the Child relies significantly on credible information that is provided by NGOs.

In this respect, Indigenous organisations could focus on ensuring that information provided to the Committee was done in a way which incorporates the framework and standards contained in the Declaration. In addition to the specific reference to Indigenous children in Article 30 of the CRC, the strong complementarities between the Declaration and the CRC identified in section 4 above illustrate the potential for this to be undertaken.

Ultimately, Indigenous organisations could contribute to the normative development of the principles and standards used by the Committee on the Rights of the Child in a way which is compatible with, and gives effect to, the Declaration. Importantly, this would also strengthen the Committee's knowledge and understanding of the special nature of Indigenous children's

⁵⁵ UNICEF, State of the World's Children Report, above n 26, p.9.

⁵⁶ Ibid.

rights and enhance the ability of the Committee to promote protection of and respect for their rights.

5.6 Incorporating the CRC and the Declaration into the Work of Indigenous Organisations

Finally, in ensuring that states work towards full implementation of the CRC and the Declaration in compliance with their international obligations, then it is essential that Indigenous organisations incorporate the guiding principles of the CRC and the Declaration into their work with Indigenous children and communities.

There is also the opportunity for Indigenous organisations to ensure that their law reform and advocacy efforts – at both the domestic and international level – are framed by using references to Indigenous children's rights and the CRC and the Declaration.

Use of both the CRC and the Declaration also presents opportunities for Indigenous organisations to mobilise and maintain coalitions to work on the implementation of human rights standards for Indigenous children.

Recommendation: Building a Human Rights Culture

Indigenous organisations should ensure that the rights and guiding principles contained in the CRC and the Declaration are incorporated into all aspects of their Indigenous children's advocacy.